IN THE HIGH COURT OF DELHI

RSA.No.231/2004

Shri Ramesh Chander ..... Petitioner
! through: Mr.Sugriva Dubey, Advocate

VERSUS

$ Shri Rajender Prasad ..... Respondent
^ through : Ms.Suman Bagga, Advocate

% DATE OF DECISION: 12.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.** (Oral)
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1. No question of law much less a substantial question of law arises for consideration in the instant second appeal. Needless to state, petitioner impleaded as a defendant in the suit filed by the respondent has suffered concurrent findings of fact against him.

2. Respondent, Rajinder Prasad is the brother of the petitioner. He filed a suit for possession, mesne profits and

permanent injunction claiming right to the suit property under

a will dated 25.10.1988 purportedly executed by the father of the parties. In the written statement petitioner impleaded as defendant took the plea that the will was invalid on account of the fact that lease hold tenure in the land in question was demised in favour of the father of the parties by L & DO and the lease contained a prohibition that the lessee could not transfer the lease-hold tenure without the prior permission of the lessor. A plea was taken that other siblings had to be impleaded as parties to the suit.

3. Following issues were framed:-

> "1. Whether the suit is bad for non joinder of necessary parties? OPD.
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> 2. Whether the will dt. 6.2.1963 executed by Late Sh. Girdhari Lal is in violation of lease deed as alleged in preliminary objection no. 1 of the W.S. and/or is not executable as alleged in preliminary objection no. 3 of the W.S.? OPD
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> 3. Whether the suit is valued properly for the purpose of court fee and jurisdiction? OPP
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> 4. Whether the plaintiff is entitled to the decree of mandatory injunction as prayed? OPP
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> 5. To what amount, if any, is the plaintiff entitled as mesne profit/damages from the defendant?
>
> 6. Whether the plaintiff is entitled to the decree of permanent injunction as prayed for? OPP
> 7. Relief."

4. After recording evidence the Trial Judge decided

issue No.1 in favour of the plaintiff holding that since based on the will the plaintiff was claiming recovery of possession only against the defendant there was no necessity of impleading any other sibling as a party. It was further held that even otherwise, the siblings have appeared as a witness in the suit and have deposed as witnesses.

5. On issue No.2 it has been held that there was no requirement of the deceased to take consent of the lessor before executing the will for the reason term of the lease which was relied upon by the defendant related to the transfer of the lease hold tenure. Learned Trial Judge held that a transfer is inter vivos and would not apply to a case of succession. It was held that a lessee is entitled to bequeath his lease hold tenure and same would not amount to a transfer inter vivos.

6. On the issue of valuation, learned Trial Judge relied upon the report of the valuer. Holding on issues 1, 2 and 3 in favour of the plaintiff, necessary consequence was that issue No.4 and 6 were decided in favour of the plaintiff for the reason he successfully proved that when in permissive possession, defendant raised unauthorized constructions in the suit property. Pertaining to mesne profits, in view of the evidence of

comparable rental in the colony, Rs.800/- per month were awarded as mesne profits. In view of decision on earlier issues, consequences decision on issue No. 6 was to restrain the defendant from creating any third party rights in the property.

7. In appeal, appellant tried to argue out a case different that what was projected in the written statement. In his appeal, appellant sought to urge that the property in question was demised under lease hold tenure in lieu of certain ancestral properties and on that count it was sought to be urged that the father of the two brothers could not have executed the will as he did not own the property. Learned Appellate Judge has noted the said contention and has rejected the same holding that in appeal, issues not litigated upon before the Trial Judge could not be urged.

8. In first appeal a pea was urged that the will was not duly executed. The plea was negated on two grounds. First that no such plea was specifically raised. Secondly, even on evidence on record the will was not found to be suspicious.

9. The pleas which were sought to be urged before the First Appellate Court are sought to be re-agitated in the second appeal.

10. Suffice would it be to record that at the appellate

stage a party cannot project a case not projected at the trial. Further, evidence cannot be re-appreciated save and except the plea that given the evidence on record, conclusions arrive at are faulty.

11. No substantial question of law arises for consideration.

12. Dismissed.

November 12, 2007 **PRADEEP NANDRAJOG, J.**
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